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No. 96-2041

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY BOYD, ET AL., PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioners' claim for rescission of their contracts for sale of real property to the government because of petitioners' unwillingness to tender back the payments they received under the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-19a) is not published, but the judgment is noted at 107 F.3d 922 (Table). The opinion of the district court (Pet. App. 1a-9a) is reported at 897 F. Supp. 590.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1996. A petition for rehearing was denied on March 28, 1997. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on June 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are African-Americans who owned single-family houses located on a tract of chemically contaminated land in Texarkana, Texas. Pet. App. 1a, 12a. In 1991, Congress, pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, appropriated $5 million to the Environmental Protection Agency (EPA) for acquisition of the contaminated property and permanent relocation of the site's residents. Pet. App. 2a, 12a; Pet. 2-3. In 1992, Congress appropriated an additional $612,000 for that purpose. Pet. App. 2a.

The EPA, through its agent, the U.S. Army Corps of Engineers (Corps), negotiated the purchase of petitioners' property based upon appraisals at its pre-contamination value, *i.e.* the value of the property as if it were not contaminated. Pet. App. 2a-3a, 12a-13a. When making purchase offers, the Corps sent individual letters to the petitioners stating that, if negotiations of a direct purchase failed, the property would have to be acquired through condemnation proceedings after a reappraisal based on the actual value which would likely be lower then the appraised value. *Id.* at 12a-13a. The letter specified that that information should not be considered a threat because it was necessary so that petitioners would be fully informed of the relevant law and procedures, and because the Corps would make every effort to negotiate a fair settlement with them. *Ibid.* By the end of 1992, petitioners all executed contracts selling their property to the Corps. Many of them also received relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

(Relocation Act), 42 U.S.C. 4601 *et seq.*, to assist with moving expenses and the cost of replacement housing. Pet. App. 13a. All but $207,059 of the appropriated funds have been spent. *Id.* at 2a n.1.

b. After accepting the government's purchase payments and relocation benefits, petitioners filed suit, in the United States District Court for the District of Columbia, against respondents, the administrator of the EPA and an Army Corps of Engineers official, challenging the validity of the contracts conveying their property to the Corps. Petitioners alleged, *inter alia*, that the contracts violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because respondents acted arbitrarily and capriciously and abused their discretion by threatening to condemn their properties at post-contamination values, contrary to congressional intent. Pet. App. 13a-14a. Petitioners also claimed that they were entitled to higher payments for replacement housing under the Relocation Act. *Ibid.* They also alleged that the contracts violated the Fifth Amendment's guarantee of due process and equal protection, as well as Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a), because the threatened post-contamination value condemnation was racially discriminatory in that residents of seven white communities, whose contaminated properties had been acquired by the EPA, were treated differently. Pet. App. 1a, 14a. Petitioners sought rescission of the sales contracts and additional compensation. *Id.* at 2a.

2. The district court granted respondents' motion for summary judgment. Pet. App. 1a-9a. For purposes of the summary judgment motion, the court accepted as true petitioners' factual allegations, including their contention that they understood the

language in the Corps' letter to be threatening and their assertion that, from 1978 to 1994, "the EPA relocated at least seven non-minority communities exposed to hazardous chemicals and that offer letters sent to residents of those communities were substantially similar" to those sent petitioners, "except that they did not advise homeowners that the properties would have to be condemned based on their contaminated value if negotiations failed." *Id.* at 3a-4a.

The court held that petitioners' challenges to the contracts under the APA were not subject to judicial review because the government letters containing the alleged threats did not amount to final agency action. Pet. App. 4a-5a. It further ruled that, even if the letters constituted final agency action, petitioners had not shown that such a ruling would have been unlawful because "[t]he condemnation process does measure 'just compensation' by fair market value." *Id.* at 5a (citations omitted). And, petitioners conceded that the statutory provision directing the EPA's acquisition of the land did not specify whether the purchase should be at pre- or post-contamination value. *Ibid.* The court ruled that petitioners' claim under the Relocation Act must fail because they had not exhausted administrative remedies. *Id.* at 6a.

The district court also held that petitioners could not establish a valid claim of racial discrimination because they had not shown that they were similarly situated to the residents in the non-minority communities involved with federal acquisition of properties over hazardous waste sites, who allegedly had been treated differently. Pet. App. 6a. Petitioners had conceded that there were "differences in offers, acquisition practices or other dissimilarities that might well exist based on a variety of factors at different sites."

Id. at 7a. The court further ruled that, even if the residents of the non-minority communities were found to be "similarly situated," petitioners could not prevail absent a showing of a discriminatory purpose or intent, and petitioners had not offered or identified evidence of any such purpose or intent. The only evidence proffered was the Corps' letter which, in the court's view, was "appropriate and nonthreatening." The court noted that, in fact, the Corps "may have been on shaky ground had they *failed* to accompany their offers with the information that sellers could expect only fair market value in the event of condemnation." *Id.* at 7a-8a n.4.

Finally, the court ruled that petitioners' Fair Housing Act claim was barred because the federal government had not waived its sovereign immunity against monetary relief under that Act. Pet. App. 8a-9a. The court rejected petitioners' attempt to characterize the relief sought as "remediation" or "rescission," because petitioners had made it clear that they were "not prepared to tender back the money they received when they sold their * * * properties without assurance that they would receive greater sums of money immediately." *Ibid.*

3. The court of appeals affirmed. Pet. App. 10a-19a.[1] The court ruled that, even if petitioners are

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[1] As a threshold matter, the court of appeals determined that it had jurisdiction over the appeal, notwithstanding 28 U.S.C. 1295(a)(2), which generally vests the Federal Circuit with jurisdiction over appeals from district courts where the jurisdiction of the district court was based in part on the Little Tucker Act, 28 U.S.C. 1346. Pet. App. 14a-16a. The court acknowledged that a claim for monetary relief because the Corps violated the APA, the Fair Housing Act, or the Fifth Amendment, would likely be based in part on the Little Tucker

correct in claiming that the Corps' acts rendered the sales contracts unlawful, the rescission sought by petitioners was not available to them. The court reasoned that, because "rescission cannot be awarded where the plaintiff neither tenders what he received nor seeks the return of what he delivered," rescission was not available to petitioners who were not willing to tender back the money they had received from the government "without an assurance that they [would] receive greater compensation immediately," and who could not seek the return of their houses which had been demolished. Pet. App. 18a-19a. In light of its conclusion that the remedies sought by petitioners' lawsuit were unavailable, the court of appeals did not reach the merits of petitioners' claims.

ARGUMENT

1. a. Petitioners contend (Pet. 10-12) that the instant case is closely analogous to the issue before the Court in *Oubre* v. *Entergy Operations, Inc.*, No. 96-1291 (to be argued November 12, 1997), and that the Court, therefore, should either grant review now or delay ruling on the petition so that review can be

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Act (or the Tucker Act for amounts of $10,000 or more), but concluded that petitioners had abandoned any claim for damages under the contracts and had limited themselves to a request for rescission. *Id.* at 15a (citing district court argument and petitioners' court of appeals brief). The court found that the Relocation Act claim did not alter the jurisdictional ruling because that claim was frivolous, in light of petitioners' failure to comply with the regulatory requirement of an administrative appeal. *Id.* at 15a-18a. The court also found that petitioners appeared to jettison their claim for declaratory relief—relief that would not be available, in any event, because it would only serve as a predicate to success in a later suit for damages. *Id.* at 19a.

granted and the case remanded following issuance of the Court's decision in *Oubre*.

The question before the Court in *Oubre* involves the validity of an employee's waiver of rights under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and whether retention of severance payments ratified the waiver, where the waiver did not satisfy specifically enumerated statutory prerequisites to a knowing and voluntary waiver of ADEA rights. The ADEA contains detailed provisions governing the validity of any purported waiver of the right to bring suit under that statute. 29 U.S.C. 626(f). The *Oubre* case turns on matters of statutory construction related to those provisions, as well as the objectives underlying congressional enactment of the ADEA, including deterrence of employers from engaging in unlawful practices. No analogous statutory text or congressional purpose is at issue here. The steps necessary to avoid or rescind the sales contracts in the instant case are governed by principles of equity and common law, not the statutory requirements and remedial purposes of the ADEA. Cf. *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679, 683 n.5 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994).

For similar reasons, the Court's decision in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968), see Pet. 11, does not support petitioners' argument for review. The *Hogue* case involved the validity of a waiver of claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* The Court's ruling that the employee could proceed with his suit under the FELA, without tendering back the consideration he had received from his employer, was based on the Court's conclusion that requiring tender back would be

"wholly incongruous with the general policy of the Act" to provide injured employees a right to recover for injuries negligently inflicted by their employer. 390 U.S. at 518. In contrast to the situations in *Hogue* and *Oubre*, conditioning rescission of petitioners' contracts on restoration of the benefits they have received would not arguably run afoul of a remedial statutory scheme. Rather, it would accord with the equitable principle that a party cannot seek to unmake a contract while simultaneously retaining the contract's benefits.

Therefore, the Court's decision in *Oubre* is unlikely to have any bearing on the issues presented here, and there is thus no reason to defer consideration of the petition or to grant the petition pending the outcome of that case.

b. The decision below is consistent with the decisions of other courts of appeals holding that the equitable remedy of rescission cannot be afforded to parties who are unable or unwilling to surrender the benefits of the challenged contract and restore the status quo ante. In *United States* v. *Texarkana Trawlers*, 846 F.2d 297, cert. denied, 488 U.S. 943 (1988), the Fifth Circuit explained why these principles preclude a party seeking rescission from retaining money received under the challenged contract:

> Rescission, unlike termination, requires the parties to "unmake" the contract. Rescission * * * attempts to restore the parties to the rescinded contract to the *status quo* that existed before the contract was formed. The parties can restore each other to the *status quo ante* only if they can restore to each other what each took under the rescinded contract. If it is impossible to insure

> that all property exchanged is returned, then the contract cannot be rescinded. Even the party seeking rescission must return whatever property it has received under the rescinded contract.

Id. at 304 (citations omitted).

Other courts of appeals have similarly held that rescission requires a return to the pre-contract status quo, and that rescission cannot be effected if return to the status quo is not feasible. See, *e.g.*, *Hibiscus Associates, Ltd.* v. *Board of Trustees of the Policemen and Firemen Retirement System*, 50 F.3d 908, 917 (11th Cir. 1995); *Erie Telecommunications, Inc.* v. *City of Erie*, 853 F.2d 1084, 1092 (3d Cir. 1988); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F.2d 915, 928 (1st Cir.), cert. denied, 364 U.S. 911 (1960).

2. Petitioners assert (Pet. 12-13) that review also may be warranted because, in determining that rescission is unavailable, the court of appeals relied in part on the fact that petitioners could not seek return of their houses because they had already been destroyed by respondents. Petitioners contend that respondents' actions should have no effect on petitioners' legal rights to rescission.

As petitioners appear to acknowledge (Pet. 12), the inability of petitioners to recover their homes does not appear to have been an independent ground for the court of appeals' ruling. Regardless of whether the government was willing or able to return petitioners' property, petitioners' refusal to tender back the payments they received under the contracts precludes rescission of the contracts. In any event, respondents destroyed petitioners' homes, not to frustrate subsequent claims of rescission, but because the govern-

ment had sought the property for that specific purpose, as part of its plan to remedy the environmental hazards on petitioners' land. Because respondents did not engage in any wrongful conduct, but only carried out the actions contemplated by the sales contracts, their conduct cannot support an equitable exception that would permit rescission without return to the pre-contract status quo. Cf. *Financial Timing Publications, Inc.* v. *Compugraphic Corp.*, 893 F.2d 936, 946-947 (8th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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